IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CHRISTINE R. BERROTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**CIVIL ACTION**
FARM BUREAU MUTUAL INSURANCE CO., INC.,	)	**No. 01-2095-CM**
	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Pending before the court is plaintiff Christine R. Berroth's Application for Attorneys' Fees, Expenses & Costs (Doc. 140). As set forth below, the court awards attorneys' fees and costs of $119,102.46.

This case was tried December 9-17, 2002, on plaintiff's claim that defendant failed to promote her in violation of Title VII of the Civil Rights Act of 1964. The jury returned a verdict in favor of plaintiff on December 17, 2002, and awarded $10,325.82 in compensatory damages and $10,000 in punitive damages. On April 28, 2003, the court entered an order which, in part, denied defendant's motions pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, and reserved a ruling on plaintiff's application for attorneys' fees, on the grounds that plaintiff had not yet filed a memorandum required by District of Kansas Rule 54.2. The court has received and reviewed plaintiff's memorandum, defendant's response, and plaintiff's reply, and is prepared to rule.

Plaintiff requests the court to award $124,875.25 in fees and expenses pursuant to 42 U.S.C. §§ 1981a, 1988, & 2000e-5, and has attached itemized billing records. Plaintiff, as the fee applicant, carries the

burden of establishing that she is entitled to an award of attorneys' fees and must document the appropriate hours expended and hourly rates. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In determining a reasonable fee, "the most useful starting point . . . is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 432. From this initial calculation, the court "should exclude . . . hours that were not 'reasonably expended.'" *Id.* A party seeking to recover attorneys' fees must provide the court with time records that "reveal . . . all hours for which compensation is requested and how those hours were allotted to specific tasks." *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983).

The court approaches the issue of reasonableness by first considering whether it is appropriate to exclude certain items from the billing records submitted by plaintiff that defendant argues are not reasonable expenses. Second, the court determines whether the rates charged by plaintiff's counsel are reasonable.

I. Items Defendant Argues Should be Excluded as Unreasonable Attorneys' Fees

A. Unsuccessful Claims

1. Motion to Compel

Defendant argues plaintiff should not recover for expenses incurred in connection with plaintiff's Motion to Compel, which was denied by U.S. Magistrate Judge James P. O'Hara, and with the Motion for Review of that order, which was denied by the undersigned judge.

Plaintiff states in her memorandum in support of her motion for attorneys' fees, that she does not seek payment with regard to the Motion to Compel and Motion for Review. Plaintiff itemizes this amount as 34.50 hours, or a total of $4,830.00 in attorneys' fees, and expenses of $5.35. Plaintiff has not, however, provided any indication to the court that these figures were deducted from the total amount claimed. The court is unable to verify that this amount was excluded from the total fees plaintiff seeks. As noted above, it is plaintiff's burden

to document the expenses claimed. The court subtracts $4,830.00 in fees and $5.35 in expenses from the total amount claimed.

2. Motion to Consolidate

Defendant argues plaintiff should not recover for expenses incurred in connection with plaintiff's Motion to Consolidate, which the court denied. Plaintiff states in her memorandum in support of her motion for attorneys' fees, that she does not seek payment with regard to the Motion to Consolidate. Plaintiff itemizes this amount as 3.50 hours, or a total of $560.00 in attorneys' fees. Plaintiff has not, however, provided any indication to the court that these figures were deducted from the total amount claimed. The court is unable to verify that this amount was excluded from the total fees plaintiff seeks. As noted above, it is plaintiff's burden to document the expenses claimed. The court subtracts $560.00 in fees from the total amount claimed.

3. Sexual Harassment and Retaliation Claims

Defendant contends plaintiff should not recover for legal work related to a sexual harassment claim, which was not preserved in the Pretrial Order; and a retaliation claim, upon which the court granted summary judgment in favor of defendant. Defendant states that, "[b]ecause counsel did not indicate which block entries of time were spent on the unsuccessful claims, defendant suggests that the percentage reduction would be appropriate," but does not suggest a percentage for the court to apply.

As the Tenth Circuit stated in *Jane L. v. Bangerter*:

> If claims are related, failure on some claims should not preclude full recovery if plaintiff achieves success on a significant, interrelated claim. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley*, 461 U.S. at 440; *see also Spulak v. K Mart Corp*., 894 F.2d 1150, 1160 (10th Cir. 1990). A claim is related to another claim if it is based on "a common core of facts." *Hensley*, 461 U.S. at 435.

> We have refused to permit the reduction of an attorneys fee request if successful and unsuccessful claims are based on a "common core of facts." In *Tidwell v. Fort Howard Corp*., 989 F.2d 406, 412-13 (10th Cir. 1993), for example, we held that the trial court abused its discretion in reducing attorneys fees for a plaintiff who prevailed under some provisions of the Equal Pay Act but failed on her Title VII and state law claims.

61 F.3d 1505, 1512 (10th Cir. 1995). Moreover, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435.

Here, the court finds that the alleged sexual harassment and retaliation claims arise from an operative core of facts that are common to those facts upon which plaintiff relied in presenting her failure to promote claim. In prevailing upon her failure to promote claim, plaintiff received substantial relief such that a reduction in the lodestar based upon "results obtained" is not warranted under the Supreme Court and Tenth Circuit's interpretation of existing law. Furthermore, even if the court were to find that plaintiff should not recover upon claims for which she did not prevail at trial, neither party has suggested a means through which the court could properly apportion the fees and costs. The court cannot arrive at such a method, due to the interrelatedness of the claims. Defendant's objection is overruled on this basis.

B. Expenses Unrelated to this Litigation

1. Payment of Mr. Noble's Annual Registration Fee

Defendant claims plaintiff should not recover for expenses in connection with plaintiff's compliance with a November 5, 2001 Show Cause Order entered by the court addressing plaintiff's counsel's failure to pay his annual registration fee. In response, plaintiff states, "[a]s for the total of one-half hour on November 12 & 13,

2001 . . . that would be a reduction of $70.00." (citing Ex. 1 to Pl.'s Application (November 30, 2001 invoice)). The court hereby reduces the total award by $70.00.

C. Other Allegedly Unreasonable Expenses

1. Trial Preparation for Mr. Noble

Defendant argues that expenses connected with plaintiff's counsel, Richard Noble's efforts to become prepared for trial are unreasonable because Mr. Noble first-chaired the trial while plaintiff's co-counsel, Gregory Dennis, was more involved with discovery and had greater knowledge of the case. Defendant criticizes such expenses as "duplicative."

"An attorney may not recover fees from an adversary that could not be billed to the client; such fees are presumptively unreasonable." *Sheldon v. Vermonty*, 237 F. Supp. 2d 1270 (D. Kan. 2002) (citing *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1249 (10th Cir. 1998)). The court believes it is quite common for an attorney to first-chair a trial when the attorney was not actively involved in discovery. Moreover, even if the court were to accept defendant's argument, defendant has not identified which hours should be stricken or suggested a percentage reduction for the court to apply. Defendant's objection is denied.

2. Voluminous Nature of Plaintiff's Submissions to the Court

Defendant claims plaintiff's counsel has expended unnecessary time due to plaintiff's lengthy and verbose style employed in papers submitted to the court, as noted by Judge O'Hara in his Memorandum and Order of July 18, 2002 (Doc. 59). The court concurs with Judge O'Hara's evaluation. However, the court refuses to apply a reduction in the amount of attorneys' fees claimed. This court observed in its order partially granting and partially denying summary judgment that the failure of plaintiff's *and* defendant's counsel to follow the local rules had created an undue burden upon the court in its attempt to timely adjudicate the case:

> The court encourages counsel for both parties to consult D. Kan. R. 56.1(a), and, in the future, to number separately each fact provided in a memorandum supporting or responding to a summary judgment motion. Further, the court reminds counsel that in responding to a motion for summary judgment, a party that wishes to rely upon facts not contained in the movant's memorandum should set forth each additional fact in a separate paragraph. D. Kan. R. 56.1(b)(2). In this case, counsel for both parties have included multiple facts in single numbered paragraphs. Moreover, plaintiff's counsel has presented additional facts in the same numbered paragraphs at which plaintiff responds to facts set forth in defendant's motion for summary judgment. Such disregard for the local rules of this court has hindered the court's efficient disposition of the pending motion.

Berroth v. Farm Bureau Mut. Ins. Co., Inc., 232 F. Supp. 2d 1244, 1246 n.4 (D. Kan. 2002). The court will not comment further upon the propriety of defendant's criticism of the efficiency of plaintiff's counsel. Moreover, even if the court were to attempt to apply a reduction, defendant does not suggest a method by which the court should make such a calculation. The court will not speculate regarding the amount of time a counsel whose writing is highly concise would have expended in drafting similar papers. The charges assessed by plaintiff's counsel are not unreasonable. Defendant's objection is overruled.

3. Inquiry into Proper Party Named as Defendant

Next, defendant asserts plaintiff should not recover for charges related to plaintiff's attempt to determine whether the proper party had been named as defendant. The court finds that such expenses were reasonable and could be properly charged to a client. Defendant's objection is overruled.

4. Performance by Counsel of Tasks Usually Assigned to Nonlawyers

Defendant argues that plaintiff's counsel has completed tasks usually assigned to couriers and paralegals, including delivery of papers to the courthouse for filing. In response, plaintiff claims that certain records include travel and filing time in addition to substantive work upon the case which is properly attributed to an attorney. For example, on page 5 of Exhibit 2 attached to plaintiff's application for attorneys' fees and costs, plaintiff has a single billing entry for November 15, 2002, which states a rate of $160.00 per hour for 7 hours, with the following narrative description:

> Finalize "plaintiff's witness list'; travel to courthouse to file "plaintiff's witness list"& "plaintiff's exhibit list/sheet" and hand deliver same to judge's chambers' read two cases cited by judge on anti-retaliation clause not applying to internal company investigations; phone conversation with RWN; wrote e-mails with attachments to RWN; two e-mails with attachments to T. Mann; two faxes to T. Mann of "plaintiff's witness list" and "plaintiff's exhibit list/sheet"; work on trial questions for M. Goe; phone conversation with client; work on "plaintiff's proposed voir dire questions."

The court concurs that delivery tasks could not be reasonably billed to a client and should be excluded from the total amount of recovery.

A party seeking to recover attorneys' fees must provide the court with time records that "reveal . . . all hours for which compensation is requested and how those hours were allotted to specific tasks." *Ramos*, 713 F.2d at 553. Given plaintiff's counsel's use of narratives such as that excerpted above, it is unclear what amount of time counsel devoted to delivery-related tasks. Moreover, neither party has suggested a prevailing area courier rate that ought to be imposed in lieu of the $160.00 rate per hour plaintiff seeks. The court believes that a courier could have carried out the duties in question for $50 or less. Accordingly, the court excludes from the total recovery $110 in attorneys' fees.

5. Travel Time

Defendant claims plaintiff should not recover the total amount billed for travel to and from Manhattan, Kansas. Defendant objects to an entry dated April 4, 2002, in which plaintiff's counsel states that he expended 5 hours at a rate of $160.00 per hour, with the following description: "travel to and from Manhattan, Kansas; take deposition of Charles Petrik; phone conversation with Rick Noble re: Petrik's deposition." ((Pl.'s App. for Attorneys' Fees, Costs, & Expenses, Ex. II, at 1).

As the Tenth Circuit stated in *Smith v. Freeman*, driving time may be given a reduced hourly rate due to its nature as "essentially unproductive." 921 F.2d 1120, 1124 (10th Cir. 1990). In *Aquilino v. University of Kansas*, this court applied a 50% reduction for attorney time spent in transit. 109 F. Supp. 2d 1319, 1326 (D. Kan. 2000). Clearly, however, the entire record was not devoted to driving time. As noted above, counsel's narrative insufficiently explains how counsel allocated his time. Plaintiff states that her counsel seeks only half of the total amount of the recovery in connection with Mr. Petrik's deposition, with the other half apportioned to a case involving the same parties and counsel, *Brown v. Farm Bureau Mut. Ins. Co.* The court believes four hours is a reasonable amount of travel time between counsel's office in the Kansas City area and Manhattan, Kansas. Accepting plaintiff's explanation of dividing costs between the two cases as true, the court applies a 50% reduction for two hours, and subtracts $160 in fees from the total recovery.

II. Reasonable Rate

A court assessing attorneys' fees should apply a reasonable rate, defined as one "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). The court finds that the rates charged by counsel - $185.00, $200.00, and $225.00 for Mr. Noble; $130.00, 140.00, and $160.00 for Mr. Dennis; and

$55.00 and $65.00 for paralegals - are in line with the rates prevailing in the Kansas City community by lawyers of comparable skill, experience, and reputation, particularly considering that the top rates charged by counsel were for trial time. *Accord Fid. & Deposit Co. of Md. v. Hartford Cas. Ins. Co.*, 215 F. Supp. 2d 1171, 1189 (D. Kan. 2002) (finding $205 to $250 hourly rate reasonable in commercial litigation).

III. Costs

Defendant argues plaintiff should not recover the full amount of the costs claimed, for the reasons set forth below. As noted by this court in *Ortega v. IBP, Inc.*:

> "[C]osts shall be allowed as of course to the prevailing party" under Federal Rule of Civil Procedure 54(d). Section 1920 governs what specific costs the Court may tax. 28 U.S.C. § 1920. The clerk taxes the costs upon notice by the prevailing party. Fed. R. Civ. P. 54(d)(1). The Court reviews the clerk's assessments of costs de novo. *Ortega v. City of Kansas City, Kan.*, 659 F. Supp. 1201, 1218 (D. Kan.1987), *rev'd on other grounds*, 875 F.2d 1497 (10th Cir. 1989). If § 1920 does not specifically authorize an expense, the Court may "sparingly exercise its discretion in allowing such costs." *Id*.
>
> The prevailing party carries the burden of establishing that § 1920 authorizes the costs sought to be taxed. *Green Constr. Co. v. Kan. Power & Light Co.*, 153 F.R.D. 670, 675 (D. Kan. 1994). Courts may exercise discretion in determining the necessity of the materials or services to the case. 28 U.S.C. § 1920. Once the prevailing party meets this burden, a presumption in favor of awarding the costs exists. *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1245 (10th Cir. 1988).

883 F. Supp. 558, 560 (D. Kan. 1995).

A. Postage

Plaintiff seeks reimbursement for postage expenses. However, as noted by defendant, "[f]ederal courts in Kansas deny taxation of postage costs based upon a lack of statutory authority in [28 U.S.C.] § 1920." *Id.* at 562. Defendant's objection is sustained.

B. Facsimile Transmissions

Plaintiff seeks to recover for several facsimile transmissions. Defendant argues that the court should deny such expenses, because plaintiff does not identify the basis for the charges. In plaintiff's response, she states that the faxes were used to transmit documents associated with the trial and for purposes of serving defense counsel by fax as required by the pretrial order. The charges in dispute total $34.00, and plaintiff's rate per page was $0.50.

The court finds plaintiff has sufficiently justified the facsimile charges claimed, and that the rate of $0.50 per page is reasonable. *Accord Ortega*, 883 F. Supp. at 562 (finding that a rate of $1.00 per page faxed was reasonable).

C. Photocopies

Defendant argues plaintiff should not recover the costs of in-house photocopies, because plaintiff has not stated the per page charge for such copies. Based upon the court's experience and knowledge of the case, the court is satisfied that a per page charge of $0.10 is reasonable. *Accord Cadena v. Pacesetter Corp.*, 1999 WL 450891, at *8 (D. Kan. Apr. 27, 1999).

D. Deposition Transcripts

Finally, defendant objects that the plaintiff has not properly attributed costs of deposition transcripts between this case and the *Brown* action. In response, plaintiff states that each of the depositions to which defendant objects were reasonably necessary. Specifically, plaintiff pointed out that each of the five witnesses was called at trial, and that both parties cited the depositions in question in their summary judgment briefs. Furthermore, plaintiff points out that she had attempted to be economical by taking only the depositions of four of the individuals in question. The court finds plaintiff has made an adequate showing that the depositions to which defendant objects were reasonably necessary in this case. Defendant's objection is overruled.

IV. Order

The court accordingly awards fees and costs to plaintiff as follows:

$124,875.25 [amount claimed in attorneys' fees and costs]
- 4,830.00
- 5.35
- 560.00
- 70.00
- 110.00
- 160.00
- 37.44 [postage as calculated by court]

$119,102.46

IT IS THEREFORE ORDERED that plaintiff's Application for Attorneys' Fees, Expenses & Costs (Doc. 140) is granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiff is awarded $**119,102.46** in attorneys' fees and costs.

Dated this 5th day of August 2003, at Kansas City, Kansas.

s/CARLOS MURGUIA
CARLOS MURGUIA
United States District Judge